

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§295.300 - 295.306.

Background and Summary of the Factual Basis for the Proposed Rules

In 2015, the 84th Texas Legislature passed House Bill (HB) 2031 and HB 4097. HB 2031 relates to the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater. HB 4097 addresses seawater desalination for industrial purposes.

In HB 2031, the legislature declared that: "With this state facing an ongoing drought, continuing population growth, and the need to remain economically competitive, every effort must be made to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water." The legislature also declared that: "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." To that end, the legislature stated the purpose of HB 2031 was to "...streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

In HB 2031, the legislature created new Texas Water Code (TWC), Chapter 18, to address marine seawater desalination projects. HB 2031 also amended TWC, §5.509,

Temporary or Emergency Order Relating to Discharge of Waste or Pollutants; TWC, §5.551, Permitting Procedures; Applicability; TWC, §7.302, Grounds for Revocation or Suspension of Permit; TWC, §11.0237, Water Rights for Instream Flows Dedicated to Environmental Needs or Bay and Estuary Inflows; TWC, §11.082, Unlawful Use: Civil Penalty; TWC, §11.0842, Administrative Penalty; TWC, §11.121, Permit Required; TWC, §16.053, Regional Water Plans; and, TWC, §26.0291, Water Quality Fee. In addition, HB 2031 amended Texas Health and Safety Code (THSC), Chapter 341, Subchapter C, by adding THSC, §341.0316, Desalination of Marine Seawater for Drinking Water, and repealed TWC, §16.060, Desalination Studies and Research.

TWC, §18.003(a), requires a person to obtain a permit to divert and use state water that consists of marine seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a total dissolved solids (TDS) concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter (mg/L). TWC, §18.003(b), creates an exemption from permitting to divert and use marine seawater if TWC, §18.003(a), does not apply. In addition, TWC, §18.005(c), requires a person to obtain a permit to discharge: 1) treated marine seawater into a natural stream in this state or a lake, reservoir, or other impoundment in this state; or 2) waste resulting from the desalination of treated marine seawater into the Gulf of Mexico.

HB 2031 also directs the commission to issue a bed and banks permit to convey marine seawater in any flowing natural stream or lake, reservoir, or other impoundment. The bill prohibits: 1) the discharge of treated marine seawater into a flowing natural stream and impoundment for conveyance purposes without a discharge permit issued under TWC, Chapter 18; and 2) the diversion of marine seawater and the discharge of waste resulting from the desalination of marine seawater in a bay and estuary under the expedited permit process as allowed by TWC, Chapter 18. A person has the option to submit an application under TWC, Chapter 11 or 26 to seek a permit to divert or discharge in a bay or estuary.

Further, HB 2031 directs the commission to adopt rules to expedite permitting and related processes for the diversion of marine seawater and the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC, Chapter 18. In addition, the bill requires the commission to establish reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater.

Finally, HB 2031 requires that the Texas Parks & Wildlife Department (TPWD) and the Texas General Land Office (GLO) conduct a study to identify zones in the Gulf of Mexico that are appropriate for the diversion of marine seawater and for the discharge of waste resulting from the desalination of marine seawater and for the commission to adopt

rules designating diversion zones by September 1, 2020. Under TWC, §18.003(j) and §18.005(g), an applicant for a permit to divert marine seawater must consult with the TPWD and the GLO regarding the point(s) of diversion or discharge until such time as the commission adopts rules designating diversion or discharge zones.

HB 4097 relates to seawater desalination projects. This bill creates TWC, §11.1405, Desalination of Seawater for Use for Industrial Purposes, and TWC, §26.0272, Permits Authorizing Discharges from Certain Seawater Desalination Facilities; and amends TWC, §27.021, Permit for Disposal of Brine from Desalination Operations or Drinking Water Treatment Residuals in Class I Injection Wells, and TWC, §27.025, General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, to address seawater desalination for industrial purposes.

TWC, §11.1405(a), requires a person to obtain a permit to divert and use state water that consists of seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a TDS concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 mg/L. TWC, §11.1405(b) creates an exemption from permitting to divert and use seawater if TWC, §11.1405(a) does not apply. When a permit application is required, TWC, §11.1405(e) specifies that the application does not require a finding of

water availability and TWC, §11.1405(f) requires the permit to be consistent with the commission's adopted environmental flow standards in 30 TAC Chapter 298, Environmental Flow Standards for Surface Water. TWC, §11.1405(h), directs the commission to adopt rules to expedite permitting and related processes for the diversion of seawater.

In October 2015, the commission held a stakeholder meeting to solicit comments regarding the implementation of HB 2031 and HB 4097. The executive director based these proposed rules on consideration of the comments received from the stakeholders, sound science and other public interest and relevant factors.

In corresponding rulemakings published in this issue of the *Texas Register*, the commission also proposes new sections in 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 297, Water Rights, Substantive; and 30 TAC Chapter 318, Marine Seawater Desalination Discharges to implement HB 2031 and HB 4097.

Section by Section Discussion

Subchapter G: Desalination, Procedural

The commission proposes new Subchapter G in Chapter 295 to contain all of the requirements for a water right application to divert marine seawater or seawater and a water right application to convey treated marine seawater in the bed and banks of a

watercourse. This new subchapter also contains the requirements for notice of a water right application to divert marine seawater or seawater and for notice of a water right application to convey treated marine seawater in the bed and banks of a watercourse. The commission must adopt rules to implement TWC, §11.1405 and Chapter 18. The commission specifically invites commenters to provide any relevant information that may differ from its proposed rules, which in the commenter's opinion would assist the commission in deciding on adopted rules for water right applications to divert marine seawater or seawater and for water right applications to convey treated marine seawater in the bed and banks of a watercourse. The adopted rules may differ from this proposal and may include additional components based on public comment. The commission invites comments on all aspects of the proposed rules.

§295.300, Applicability

The commission proposes new §295.300 to describe the purpose of Subchapter G and under what circumstances it applies. Subchapter G is intended to provide an alternate procedure for obtaining an authorization to divert and use state water that consists of marine seawater, to divert and desalinate water for industrial purposes from a bay or arm of the Gulf of Mexico, and to convey treated marine seawater in the bed and banks of a watercourse.

§295.301, Definitions

The commission proposes new §295.301. The proposed section has definitions of terms that only apply to Chapter 295, Subchapter G. 30 TAC Chapter 55 does not apply to applications to divert marine sea water from the Gulf of Mexico or to take seawater from a bay or arm of the Gulf of Mexico for industrial purposes, except for Chapter 55, Subchapter G. In §295.301(1) the commission proposes a definition of "Affected person." In §295.301(2) the commission proposes a definition of "Marine seawater" consistent with TWC, §18.001(2). In §295.301(3) the commission proposes a definition of "Seawater" as water that is derived from a bay or arm of the Gulf of Mexico.

§295.302, Requirements for Diversion of Marine Seawater and Diversion of Seawater.

The commission proposes new §295.302. The proposed section sets out the application requirements for a water rights application to divert marine seawater or seawater that will apply only to applications under Subchapter G. In §295.302(a) and (b), the commission proposes that an application for diversion of marine seawater or seawater conform to the requirements in §295.2 and §295.14 so that an application to divert marine seawater or seawater will be submitted in the form of a water rights application. In §295.302(c) and (d) the commission proposes that an application for a water right permit to divert marine seawater or seawater should include the location of the diversion point(s), the total amount of marine seawater or seawater to be diverted and the rate of diversion for the marine seawater or seawater to be consistent with the requirements for a water right application for a new diversion. In §295.302(e) the

commission proposes that the application shall include a purpose of use, and if the diverted marine seawater is to be used for more than one purpose, the specific amount to be used annually for each purpose. The commission proposes this requirement so that it can determine whether the proposed use is a beneficial use, and whether the proposed treatment of the marine seawater is consistent with the proposed use. The commission further proposes new §295.302(f) requiring the applicant to provide evidence that the marine seawater or seawater will be treated in accordance with commission rules based on the purpose of use for which the marine seawater or seawater will be used in accordance with TWC, §18.002(d). In §295.302(g) and (h) the commission proposes that an application to divert marine seawater or seawater include a Water Conservation Plan and evidence that the application is consistent with the State and Regional Water Plans because under TWC, §18.002(a)(1), TWC, Chapter 11, including the requirement for a conservation plan and consistency with state and regional water plans, applies to a permit to divert marine seawater. In §295.302(i), the commission proposes a requirement that an application include a determination of the TDS concentration of the water source in accordance with TWC, §18.003(c). Proposed §295.302(j) includes a requirement relating to measures to minimize impingement and entrainment associated with the requested diversion as prescribed by TWC, §18.003(h). Finally, in §295.302(k) the commission proposes that an application to divert marine seawater shall include evidence of consultation with the TPWD and the GLO in accordance with TWC, §18.005(i). The commission proposes that an applicant for

diversion of seawater should also provide evidence of consultation because diversion zones have not been identified at the time of this rulemaking.

§295.303, Review Timeframes

The commission proposes new §295.303 regarding review timeframes for a water right application to divert marine seawater and to divert seawater for industrial use from a bay or arm of the Gulf of Mexico to provide for an expedited review of applications submitted under Subchapter G in accordance with TWC, §18.003(e). In §295.303(a) the commission proposes that an application must be administratively complete when submitted in order for expedited review to apply. In §295.303(b) applications will be reviewed within 10 working days to determine whether the application is administratively complete and contains the information required under §295.302. In §295.303(c) the commission proposes that technical review of a water right application to divert marine seawater be completed within 60 working days in order to provide for expedited review of these applications. In §295.303(d) the commission proposes requirements and timeframes that would apply to a water right application to divert marine seawater or seawater if the information required under §295.302 is not sufficient for a complete review. The commission proposes that an applicant be provided no less than 30 days to submit the necessary information and provides that if the necessary information is not received, the application may be returned. The commission proposes this requirement to expedite processing of water right applications to divert

marine seawater and seawater.

§295.304, Notice of Application to Divert Marine Seawater or Seawater

The commission proposes new §295.304 to provide the notice requirements for an application to divert marine seawater or to divert and desalinate seawater for industrial use. In §295.304(a) the commission proposes that mailed notice of an application be provided to the TPWD and the GLO because water right applications to divert marine seawater and to divert and desalinate seawater for industrial use would not be located in a river basin as set out in TWC, §11.002(11). The notice requirements in this section do not apply to points of diversion which are located in a river basin as set out in TWC, §11.002(11). In §295.304(b)(1) - (8) the commission proposes that the notice include the applicable information required for mailed notice of a water right application, as set out in §295.151. In §295.304(b)(9) the commission proposes that the notice state that an affected person may submit written comments and request a contested case hearing in accordance with TWC, §18.003(e). In §295.304(b)(11) the commission proposes that the notice can also include any additional information the commission considers necessary which provides the commission flexibility to ensure that the notice includes all relevant information on the application. In §295.304(c) the commission proposes that requests for a contested case hearing submitted on applications to divert marine seawater or seawater will be processed in accordance with 30 TAC Chapter 55, Subchapter G.

§295.305, Requirements for an Authorization to Convey Treated Marine Seawater in Bed and Banks

The commission proposes new §295.305. The proposed section sets out the application requirements for a water rights application to convey treated marine seawater in the bed and banks of a watercourse that will apply only to applications under Subchapter G. In §295.305(a), the commission proposes that an applicant for a water right to convey treated marine seawater in the bed and banks of a watercourse provide evidence that the marine seawater will be treated so as to meet standards that are at least as stringent as the commission's adopted water quality standards for the watercourse in which the treated marine seawater will be conveyed in accordance with TWC, §18.004(a). In §295.305(b) the commission proposes that treated marine seawater conveyed under an authorization granted under this section may only be used by the person to whom the authorization is granted in accordance with TWC, §18.004(d). The commission proposes §295.305(c) to implement TWC, §18.004(f), which states that §295.305 does not prohibit a person from conveying marine seawater in any other manner authorized by law. The commission proposes §295.305(d) to provide the application requirements for a water right permit to convey treated marine seawater in the bed and banks of a watercourse. The requirements in §295.305(d) are substantially the same requirements for an application under §295.113; however, §295.305(d) does not include requirements for information on interbasin transfers because the conveyed treated marine seawater does not originate from a river basin. The commission's proposed application

requirement in §295.305(d)(4) implements TWC, §18.004(c), which relates to discharge of the treated marine seawater, and the commission's proposed application requirement in §295.305(d)(5), relating to consistency with environmental flow standards, implements TWC, §11.1405(f) and (g). The commission's proposed application requirement in §295.305(d)(6) ensures that sufficient information is provided in the application to allow the commission to determine whether other water rights could be affected by the application. The commission's proposed application requirement in §295.305(d)(7) facilitates expedited processing of an application because the accounting plan will be required to be submitted with the application.

§295.306, Notice of Application to Convey Treated Marine Seawater in Bed and Banks

The commission proposes new §295.306 to provide the notice requirements for a water right application to convey treated marine seawater in the bed and banks of a watercourse. In §295.306(a) - (c) the commission proposes that mailed notice of an application be provided to every water right holder of record downstream of the discharge point, that the application not require published notice, and that the applicant shall be responsible for the costs of providing notice. The commission's proposed notice is consistent with the notice requirements in §295.161, which states the notice requirements for an application under TWC, §11.402(c) consistent with TWC, §18.004(e). In §295.306(d)(1) - (7) and (10), the commission proposes that notice include general information on the application and contact information for the agency.

Section 295.306(d)(8) and (9) specifically implements TWC, §18.004(b), relating to notice. In §295.306(d)(11) the commission proposes that the notice can also include any additional information the commission considers necessary which provides the commission flexibility to ensure that the notice includes all relevant information on the application. Finally, in §295.306(e) the commission proposes that requests for a contested case hearing submitted on applications to divert marine seawater or seawater will be processed in accordance with Chapter 55, Subchapter G.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency and no fiscal implications are expected for other units of state or local government as a result of the administration or enforcement of the proposed rules.

The proposed rules implement HB 2031 and HB 4097. HB 2031 establishes an expedited permitting process for marine seawater desalination projects. HB 4097 addresses seawater desalination as it is used for industrial purposes. The proposed rules implement a new expedited permitting process that will be applied by TCEQ staff during the administrative and technical reviews of applicable water rights applications associated with the diversion of marine seawater, the conveyance of treated marine

seawater in the bed and banks of a watercourse, and the diversion of seawater for desalination and use for industrial purposes. The rulemaking does not propose any new fees.

Although the permitting process is expedited, the agency does not expect the need for additional resources to issue any permits under the proposed rules as staff does not expect a significant number of permit applications. The rulemaking will require the applicant to consult with the TPWD and the GLO in accordance with the provisions of HB 2031 prior to submitting an application. The permit application fee for a water rights permit under this expedited permitting process would not change from the current fee for applying for a water rights permit.

Although governmental entities could apply for a water rights permit under the proposed expedited permitting process, no state or local governments are anticipated to do so at this time. Because few marine seawater diversion, conveyance, or industrial use permit applications are expected under the proposed rules, no significant fiscal implications are anticipated for the agency.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed

rules would be compliance with state law and a streamlined regulatory process for marine seawater desalination that would assist the state to develop new water supplies to meet the ever-increasing demand for water.

No fiscal implications are anticipated for businesses or individuals as a result of the administration and enforcement of the proposed rules. The proposed rules would affect businesses or individuals who apply for water rights permits associated with the diversion of marine seawater, the conveyance of treated marine seawater in the bed and banks of a watercourse, and the diversion of seawater for desalination and its use for industrial purposes.

The proposed rules would require any person or business entity that plans to divert and use state water that consists of marine seawater to determine the TDS concentrations of the seawater at the water source by monthly analysis and sampling for a period of one year. The data collected is to be provided to TCEQ in accordance with provisions in HB 2031 and HB 4097. Costs associated with TDS sampling would include monthly sample collection for one year, sampling equipment, laboratory costs, data analysis and submittal to TCEQ. The proposed rules require reasonable measures to minimize impingement and entrainment and also allow that marine seawater may be diverted for any beneficial purpose (if the seawater is treated before it is used). Personnel costs for the required sample collection and data analysis, as well as laboratory costs and

reasonable measures to minimize impingement and entrainment will be specific to each applicant. These specific costs are context dependent and can't be quantified without knowing the specific nature of each application.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the administration and enforcement of the proposed rules. The proposed rules would have the same effect on a small business as it does on a large business. It is not known how many small or micro-businesses would submit water rights applications under the proposed rules. The proposed rules do not increase the regulatory burden on small or micro-businesses unless they intend to obtain water rights permits associated with the diversion of marine seawater, the conveyance of treated marine seawater in the bed and banks of a watercourse, or the diversion of seawater for desalination and its use for industrial purposes. If a small or micro-business does apply for such a water rights permit, then it is assumed that any costs would be recovered through increased costs passed on to its customers.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are necessary in order to comply with state law and does not adversely affect small or micro-

businesses in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission has reviewed this rulemaking under Texas Government Code, §2001.0225, "Regulatory Analysis of Major Environmental Rules," and has determined that this rulemaking is not a "major environmental rule." The legislature enacted HB 2031, creating TWC, Chapter 18, which relates to marine seawater desalination, and HB 4097, creating TWC, §11.1405, relating to seawater desalination projects for industrial purposes. HB 2031 states that the purpose of the new law is to remain economically competitive in order to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water. The legislature also stated that in this state, marine seawater is a potential new source of water for drinking and other beneficial uses, and that this state has access to vast quantities of marine seawater from the Gulf of Mexico. The legislature stated that the purpose of HB 2031 was to "... streamline the regulatory process for and reduce the time required for and cost of marine seawater

desalination."

Therefore, the purpose of the rulemaking is not "to protect the environment or reduce risks to human health from environmental exposure," in a way that may "adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state" (Texas Government Code, §2001.0225(g)(3)). The purpose of this rulemaking is to add procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The rules proposed in Chapter 295 streamline the processes for obtaining a permit to divert or transport marine seawater under TWC, Chapter 18, and to divert seawater for industrial purposes under TWC, §11.1405.

Even if this rulemaking was a "major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225 for the requirement to prepare a full Regulatory Impact Analysis. This rulemaking is not governed by federal law, does not exceed state law, does not come under a delegation agreement or contract with a federal program, and is not being proposed under the TCEQ's general rulemaking authority. This rulemaking is being proposed under specific state statutes enacted in HB 2031 and HB 4097.

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated these proposed rules and performed analysis of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these proposed rules is to add procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The proposed rules would substantially advance this stated purpose by adding provisions to Chapter 295 to streamline the processes for obtaining a permit to divert or transport marine seawater under TWC, Chapter 18, and to divert seawater for industrial purposes under TWC, §11.1405.

The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because these rules do not impact private real property. In HB 2031, the legislature expressed that "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." For marine seawater, there are no permanent water rights, real property rights that have been granted for use of the water in the Gulf of Mexico. For seawater in a bay or arm of the

Gulf of Mexico, very few water rights have been granted for this water. There is no potential for harm to other water rights by this rulemaking. The burden on private real property rights will be nonexistent or minimal because of the amount of water in the Gulf of Mexico, or a bay or arm of the Gulf of Mexico. Diversions of seawater in a bay or arm of the Gulf of Mexico are also limited to industrial water and water for municipal and domestic needs will not be taken from this part of the Gulf of Mexico.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and, 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone.

CMP policies applicable to the proposed rules include those contained in 31 TAC

§501.33(a). The proposed rules implement HB 2031 and HB 4097, which direct the commission to regulate the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater through expedited permitting and related processes. In HB 2031, the legislature finds "...that it is necessary and appropriate to grant authority and provide for expedited and streamlined authorization for marine seawater desalination facilities, consistent with appropriate environmental and water right protections, ..." Since one of the purposes of the proposed rules is to protect coastal natural resources, the rules are consistent with the CMP goals and policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies, because these rules do not create or have a direct or significant adverse effect on any CNRAs, and because one of the purposes of the proposed rules is to protect coastal and natural resources.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on June 21, 2016, at 2:00 p.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2015-029-295-OW. The comment period closes on July 5, 2016.

Copies of the proposed rulemaking can be obtained from the commission's website at http://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Kathy Ramirez, Water Availability Division, at (512) 239-6757 or Kathy Alexander, Water Availability Division, at (512) 239-0778.

SUBCHAPTER G: DESALINATION, PROCEDURAL

§§295.300 - 295.306

Statutory Authority

The rules are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; TWC, §5.013(a)(1), concerning the TCEQ's authority over water and water rights; TWC, Chapter 18, concerning Marine Seawater Desalination Projects; and TWC, §11.1405, concerning Desalination of Seawater for the Use of Industrial Purposes.

The proposed rules implement TWC, §§5.013, 5.102, 5.103, 5.120, and 18.005; and House Bill (HB) 2031 and HB 4097 (84th Texas Legislature, 2015).

§295.300. Applicability.

(a) This subchapter only applies to diversion and use of marine seawater, diversion of seawater from a bay or arm of the Gulf of Mexico, and conveyance of marine seawater through the bed and banks of a flowing stream. The commission may issue a permit under this section to authorize a diversion of state water from the Gulf of Mexico or a bay or arm of the Gulf of Mexico for desalination and use if:

(1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or

(2) the seawater contains a total dissolved solids concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter.

(b) A person may divert and use state water that consists of marine seawater or seawater without obtaining a permit if subsection (a) of this section does not apply.

(c) A person may not begin construction of a facility for the diversion of marine seawater or seawater without obtaining a permit until the person has provided data to the commission based on the analysis of samples taken at the water source over a period of at least one year demonstrating that subsection (a)(2) of this section does not apply.

(d) A person who has begun construction of a facility for the diversion of marine seawater or seawater without obtaining a permit because the person has demonstrated that subsection (a)(2) of this section does not apply is not required to obtain a permit for the facility if the total dissolved solids concentration of the marine seawater or seawater at the water source subsequently changes so that subsection (a)(2) of this section applies.

(e) This section does not apply to a diversion of marine seawater from a point of diversion located in a bay or estuary unless the application is for a diversion of seawater for industrial use under Texas Water Code (TWC), §11.1405.

(f) TWC, Chapter 11, applies to a permit or authorization under this section in the same manner as that chapter applies to a permit or authorization under that chapter.

§295.301. Definitions.

The following words or phrases have the following meanings in this subchapter unless the context clearly indicates otherwise:

(1) Affected person--A person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. The determination of whether a person is affected shall be governed by §55.256 of this title (relating to Determination of Affected Person).

(2) Marine seawater--Water that is derived from the Gulf of Mexico.

(3) Seawater--Water that is derived from a bay or arm of the Gulf of Mexico.

§295.302. Requirements for Diversion of Marine Seawater and Diversion of Seawater.

(a) An application for diversion of marine seawater or diversion of seawater from a bay or arm of the Gulf of Mexico for industrial purposes must be submitted in accordance with §295.2 of this title (relating to Preparation of Application) and include, for each applicant, the full name, post office address, telephone number, and federal identification number. If the applicant is a partnership, it shall be designated by the firm name followed by the words "a partnership." If the applicant is acting as trustee for another, it shall be designated by the trustee's name followed by the word "trustee." If one other than the named applicant executes the application, the name, position, post office address, and telephone number of the person executing the application shall be given.

(b) The application shall include the signature of the applicant in accordance with §295.14 of this title (relating to Signature of Applicant). Each applicant shall subscribe and swear to the application before any person entitled to administer oaths, who shall also sign his or her name and affix his or her seal of office to the application.

(c) The application shall state the location of point(s) of diversion and provide latitude and longitude coordinates in decimal degrees to six decimal places for each point.

(d) The total amount of marine seawater or seawater from a bay or arm of the Gulf of Mexico to be diverted and used shall be stated in definite terms, i.e., a definite number of acre-feet annually and the application shall state the maximum rate of diversion in gallons per minute or cubic feet per second.

(e) The application shall state the purpose or purposes of each use in definite terms. If the marine seawater is to be used for more than one purpose, the specific amount to be used annually for each purpose shall be clearly set forth. If the application requests authorization to use marine seawater for multiple purposes, the application shall expressly state an annual amount of marine seawater to be used for the multiple purposes as well as for each purpose of use.

(f) The applicant shall provide evidence that the marine seawater or seawater diverted from a bay or arm of the Gulf of Mexico will be treated in accordance with applicable commission rules, based on the purpose for which the water is to be used, before it is used.

(g) The application must include a water conservation plan meeting the requirements contained in §297.208 of this title (relating to Consideration of Water Conservation).

(h) An application shall contain information describing how it addresses a water supply need in a manner that is consistent with the state water plan or the applicable approved regional water plan or, in the alternative, describe conditions that warrant a waiver of this requirement.

(i) The application must include a determination of the total dissolved solids concentration of the marine seawater or seawater at the water source based on monthly sampling and analysis and provide the data collected to the commission.

(j) The application shall provide documentation that the applicant will take reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater or seawater.

(k) The application shall include evidence of consultation with Texas Parks & Wildlife Department and the Texas General Land Office regarding the point or points from which a facility the person proposes to construct may divert marine seawater or

seawater before submitting an application for a permit for the facility if §295.300(a)(1) of this title (relating to Applicability) applies or before beginning construction of the facility if §295.300(a)(2) of this title applies.

§295.303. Review Timeframes.

(a) The review timeframes in this section only apply to applications which are determined to be administratively complete when submitted. If the application is not administratively complete, the application will not be considered for expedited processing under this section.

(b) Applications shall be reviewed by the staff for administrative completeness within 10 working days of receipt of the application by the executive director.

(c) After an application is determined by the executive director to be administratively complete, the executive director shall commence a technical review as necessary and appropriate. For purposes of this subchapter, the technical review period is that period of time beginning with the completion of the initial review period and will continue for a period of time not to exceed 60 working days.

(d) The applicant shall be promptly notified of any additional technical material

as may be necessary for a complete review. If the applicant provides the information within the period of time prescribed by subsection (c) of this section, the executive director will complete processing of the application within the technical review period extended by the number of days required for the additional data. If the necessary additional information is not received by the executive director prior to expiration of the technical review period and the information is considered essential by the executive director to make recommendations to the commission on a particular matter, the executive director may return the application to the applicant. In no event, however, will the applicant have less than 30 days to provide the technical data before an application is returned. Decisions to return material to the applicant during the technical review stage will be made on a case-by-case basis. The applicant has the option of having the question of sufficiency of necessary technical data referred to the commission for a decision instead of having the application returned.

§295.304. Notice of Application to Divert Marine Seawater or Seawater.

(a) At the time that the technical review of an application for a permit to divert marine seawater or seawater has been completed and the technical memoranda have been filed by the executive director with the chief clerk of the commission, the chief clerk shall give notice by email to the Texas Parks & Wildlife Department and the Texas General Land Office.

(b) The notice must:

(1) state the name and address of the applicant;

(2) state the date on which the application was received by the
commission;

(3) state the date the application was filed by the executive director with
the chief clerk as required by §281.17(a) or (b) of this title (relating to Notice of Receipt
of Application and Declaration of Administrative Completeness);

(4) state that the executive director has determined that the technical
review of the application is complete;

(5) state the application number;

(6) state the purpose and amount of the proposed diversion of marine
seawater or seawater;

(7) identify the location of the diversion point(s);

(8) state the executive director's recommendation regarding the application;

(9) state that an affected person may submit written comments and request a contested case hearing;

(10) include the name and address of the agency, and the telephone number of an agency contact from whom interested persons may obtain future information; and

(11) give any additional information the commission considers necessary.

(c) Requests for a contested case hearing will be processed in accordance with Chapter 55, Subchapter G of this title (relating to Requests for Contested Case Hearing and Public Comment on Certain Applications).

§295.305. Requirements for an Authorization to Convey Treated Marine Seawater in Bed and Banks.

(a) The application shall include evidence that the marine seawater conveyed

under a permit subject to the requirement in this section will be treated so as to meet standards that are at least as stringent as the water quality standards adopted by the commission and applicable to the receiving stream or impoundment.

(b) Treated marine seawater that is conveyed under an authorization granted under this section may be used only by the person to whom the authorization is granted.

(c) This section does not prohibit a person from conveying treated marine seawater in any other manner authorized by law.

(d) A person wishing to place treated marine seawater into a stream or watercourse, convey the treated marine seawater in the watercourse or stream, and subsequently divert such treated marine seawater shall file an application with the commission containing the following information:

(1) the name, mailing address, and telephone number of the applicant;

(2) the name of the stream and the locations of the point of discharge and diversion as identified on a United States Geological Survey 7.5-minute topographical map(s);

(3) the source, amount, and rates of discharge and diversion;

(4) a description of the water quality of the water discharged and the permit number and name of any related discharge permit;

(5) an assessment of the adequacy of the quantity and quality of flows remaining after the proposed diversion to meet instream uses and bay and estuary freshwater inflow needs;

(6) the estimated amount of treated marine seawater that will be lost to transportation, evaporation, seepage, channel or other associated carriage losses from the point of discharge to the point of diversion, including the method used to calculate the losses;

(7) an accounting plan that demonstrates that the applicant will only divert the amount of treated marine seawater discharged less losses; and

(8) any other information the executive director may need to complete an analysis of the application.

§295.306. Notice of Application to Convey Treated Marine Seawater in Bed

and Banks.

(a) Notice of an application to convey treated marine seawater in the bed and banks of a stream or watercourse shall be provided by first class mail, postage prepaid, by the commission to every water right holder of record downstream of the discharge point at least 30 days prior to commission consideration of the application.

(b) No published notice shall be required for an application under this section.

(c) The applicant shall be responsible for the costs of providing notice under this section.

(d) The notice must:

(1) state the name and address of the applicant;

(2) state the date on which the application was received by the commission;

(3) state the date the application was filed by the executive director with the chief clerk as required by §281.17(a) or (b) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness);

(4) state that the executive director has determined that the technical review of the application is complete;

(5) state the application number;

(6) state the purpose of use for the conveyed treated marine seawater;

(7) state the executive director's recommendation regarding the application;

(8) for applications that do not request authorization to convey treated marine seawater through a reservoir or impoundment the notice shall state that an affected person may provide written comments but may not request a contested case hearing;

(9) for applications that request authorization to convey treated marine seawater through a reservoir or impoundment the notice shall state that an affected person may request a contested case hearing;

(10) include the name and address of the agency, and the telephone number of an agency contact from whom interested persons may obtain future information; and

(11) give any additional information the commission considers necessary.

(e) Requests for a contested case hearing will be processed in accordance with Chapter 55, Subchapter G of this title (relating to Request for Contested Case Hearing and Public Comment on Certain Applications).

(f) Nothing in this section is intended to deny any additional notice to an affected person that may be required under the Texas Administrative Procedure Act.